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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLEES', RAILWAY EXPRESS AGENCY INCORPORATED AND THE GREYHOUND CORPORATION, MOTION TO AFFIRM

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Appellees, Railway Expressway Agency, Incorporated (REA) and the Greyhound Corporation (Greyhound), move pursuant to Paragraph 1(c) of Rule 16 of the Revised Rules of this Court that the judgment of the district court be affirmed.* The district court held that

> "until the facts are developed by occurrences after the stock issue [by REA to Greyhound], hearings on control and competitive effects are no more than an exercise in futility. In the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its dis-

*On July 28, 1966, Mr. Justice White signed an order extending the time of appellees to file such a motion to and including August 29, 1966.

> cretionary powers. The Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future." (Appendix A to Jurisdictional Statement, p. 39.)

That decision rests upon a unique set of absolutely undisputed facts and affirms what is in effect merely a procedural decision by the Interstate Commerce Commission (the Commission). The sole question presented is so clearly insubstantial as not to need further argument.

QUESTION PRESENTED

Whether the Commission properly acted within its discretion under Section 20a of the Interstate Commerce Act, in authorizing REA to sell twenty per cent of its stock to The Greyhound Corporation (Greyhound), without first resolving alleged questions of control of REA by Greyhound for the sixty days following such sale and alleged questions of the anti-competitive effect of such control during that period where the undisputed facts show, (1) that the present railroad stockholders of REA are and will remain in complete control of REA for that period, and (2) that the five appellant railroads may, at the expiration of the sixty day period, themselves own about fifty per cent of REA's stock and hence be in control of REA, and where the Commission expressly reserved to itself and to all parties the right to challenge the acquisition of any of REA's stock by any person on any grounds when the facts relating to any real issues of control and competitive effect become known sixty days after the sale to Greyhound is completed.

STATUTES INVOLVED

In addition to the statutes cited by appellants, the statutes involved include Section 20a(6) of the Interstate Commerce Act which is set forth in Appendix A hereto.

STATEMENT

REA, which conducts an express transportation business throughout the United States and in Puerto Rico and Canada, is entirely owned and controlled by sixty major United States railroads. (Ltr. dated October 12, 1964, from REA to the Commission, p. 3; REA's Return to Information Request, pp. 1-2.) Such control is maintained and exercised through two means, neither of which will be affected by the sale of stock to Greyhound.

In 1963 REA's then outstanding one thousand shares of stock were reclassified into 2,076,000 shares, all subject to the right of first refusal on the part of each of REA's stockholders. At the same time, 500,000 additional shares were authorized which are not subject to the right of first refusal. (REA's Return to Information Request, p. 2.) Thus, each of REA's present stockholders has a right of first refusal with respect to all of the presently outstanding stock. The only stock not subject to that right is the special block of 500,000 authorized but unissued shares which will be sold to Greyhound. (REA's Return to Information Request, pp.1-2.) Obviously, the right of first refusal gives to each of REA's present stockholders (including the five appellant railroads) the power to block any attempt by any outsider such as Greyhound to obtain any REA stock other than the special unissued block of 500,000 shares. The five appellant railroads have made clear their intention to prevent the sale of any of the presently outstanding stock to

Greyhound by exercising their rights of first refusal. Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statements, p. 44.)

A second factor which protects the present stockholders' complete control of REA is the unique structure of REA's board of directors. Under its By-laws, REA's stockholders are divided into four groups, three of which consist of railroad stockholders who operate in the Eastern, Western and Southern Districts of the United States and who have the right to and do elect seven, six and five directors respectively to REA's twenty-five man Board. (REA By-laws, Art. II, § 8.) The remainder of the Board is made up of seven directors-at-large, five of which will be elected by Greyhound when the sale of the 500,000 shares of stock is consummated. The By-law provisions governing the method of electing directors may not be changed without an affirmative two-thirds vote of REA's stock. (REA By-laws, Art. II, § 2, Art. XI*; REA Return to Information Request, pp. 10-11.)

Prior to July 1, 1961, REA was operated on a non-profit basis, with its stockholders rendering services to it and sharing any profit or loss from its operations. On that date, REA was placed on a normal profit and loss basis, which created both the incentive and the necessity to conduct an efficient and economical operation. (REA's Application, p. 6; Ltr. dated October 12, 1964, from REA to the Commission, p. 3.) Because of the historical method of operation, REA's retained earnings do not provide sufficient funds to permit it to complete long deferred capital improvements which are essential if it is to compete effectively. REA must obtain outside debt financing. In order to do so, it must increase its equity base sufficiently to make it attractive to lenders. (Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statement, p. 43.)

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*REA's By-laws were printed as Appendix I to REA's brief in the district court.

In 1964, Greyhound provided the opportunity to obtain the needed equity. Initially, Greyhound proposed to acquire a controlling interest, ranging up to one hundred per cent of the outstanding stock. However, each attempt by Greyhound to obtain any stock other than the unrestricted 500,000 shares was blocked by certain REA stockholders, including appellant railroads who own in the aggregate nearly ten per cent of REA's stock. (REA's Return to Information Request, pp. 1-4, Annex A.)

Hence, the present proposal was evolved. Greyhound will purchase the unrestricted 500,000 shares of REA stock at a price of twenty dollars per share and will be allowed to nominate and elect five of the directors-at-large. Because of a provision inserted in the proposal to satisfy the desire of certain REA stockholders to have a market for their shares, Greyhound must, immediately following the consummation of that sale, make a tender offer to REA's stockholders, good for sixty days, to purchase one million of the presently outstanding shares for twenty dollars per share. (*Id.* at pp. 2-4, Annex A(6), p. 3) However, the appellant railroads have told Greyhound, "that it would not acquire one additional share under the offer to purchase up to 1,000,000 shares subject to the right of first refusal by such railroad shareholders". (Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statement, p. 44.) Thus, although as a result of the tender offer Greyhound's holdings of REA stock may increase, the more likely outcome is that one or more of REA's present stockholders (including appellant railroads) will purchase any tendered stock, leaving Greyhound's holdings unchanged. Without knowing the outcome of the tender offer, it is impossible to predict the ultimate relationship of Greyhound and the various groups of railroad stockholders to REA.

As a result of the present proposal, REA will receive ten million dollars which the Commission found it "urgently

needs . . . in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level . . . ." (Order of March 15, 1965, p. 2; Appendix B to Jurisdictional Statement, p. 43.)

None of the foregoing facts were ever challenged in any way by any of the parties.

Confronted with these uncontroverted facts, the Commission had a choice of two possible procedures.* Having made an extensive investigation (*e.g.*, see generally REA's Return to Information Request) of the proposal as required by Section 20a(2), the Commission could approve the issuance of the 500,000 shares, reserving the question of a hearing on the alleged control and competition problems, if any, until the tender offer had been concluded and the nature and extent of those problems, if any, were known. Alternatively, the Commission could have ordered that hearings be held under Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act before the 500,000 shares were issued.

If the Commission had chosen the second alternative, as appellants urge it was absolutely required to do, it then would have been faced with extensive hearings, involving an expenditure of substantial administrative time and effort. In such a proceeding the only issues the Commission could have determined would have been what Greyhound's relationship to REA would be for the sixty days during which the tender offer was outstanding (clearly minimal in view of the absolute control exercised by the railroads) and, perhaps, whether such relationship for that period of time would

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*Appellants' suggestion that the Commission might have simply told REA and Greyhound somehow to reform a contract which took almost a year to negotiate over the opposition of the railroad appellants is both unrealistic and somewhat disingenous. Obviously neither REA nor the Commission, which found that REA urgently needed the money from Greyhound to perform its service to the public, had any assurance, or indeed any reason to believe, that the contract could be renegotiated.

be consistent with the public interest. If the Commission had followed that procedure and approved the relationship for sixty days, it would then have been necessary to hold a second set of hearings at the end of that period to determine the effect of whatever shift in REA stock ownership takes place as a result of the tender offer.

The Commission, properly we submit, selected the first and more reasonable alternative. In its order the Commission made perfectly clear "that nothing herein shall be construed as a determination of any matter under any section of the act, except Sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5". (Order of March 15, 1965, p. 3; Jurisdictional Statement, pp. 44-45.) Thus, the Commission made clear that consideration of any alleged problems relating to control or the effect on competition was reserved.

The district court held, correctly we believe, that the procedure selected by the Commission was within its discretion and that the procedure which appellants claim is absolutely required would have been "an exercise in futility". (Appendix A to Jurisdictional Statement, p. 39.)

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

The only question presented by this appeal is one of procedural timing. The Commission approved REA's application for authority to issue stock and deferred consideration of any problems of control or effect upon competition until the facts with respect to those issues are known. Appellants contend that the Commission did not have discretion to make that procedural decision. Although appellants never openly admit it, they are actually contending that the Commission must be required to hold extensive hearings to ascer-

tain what the relations between Greyhound and REA will be during the sixty days of the tender offer. Appellants have ample reason for avoiding a clear statement of that simple question in the Jurisdictional Statement. That question is so obviously insubstantial that no further argument is required.

Appellants present five questions although they seem to discuss six. The first three questions presented and the first four discussed relate to appellants' claim that the Commission must be forced to consider the alleged control question and the alleged effect upon competition now, before the facts with respect to those issues can be known.

Appellants suggest that unless the Commission is required to consider those questions now they will never be considered. That is obviously not so. It ignores the fact that Greyhound has represented to the Commission that if the time arrives when it appears that there is any possibility of Greyhound acquiring control of REA, Greyhound will file the necessary application for authority to acquire such control under Section 5. (Ltr. dated December 3, 1964, from Greyhound to the Commission, p. 2.) Appellants' suggestion also ignores the specific reservation of power by the Commission in its order. The Commission dismissed appellants' complaint under Section 5(7) of the Interstate Commerce Act on the ground that such a proceeding would not be appropriate until all the facts became known. Once the transactions resulting from the tender offer are completed and the facts are known, appellants may then file a complaint under Section 5(7) if in their view Greyhound or the Commission itself has failed to take appropriate action. If the Commission were to abuse its discretion in dismissing such a complaint, appellants would be entitled to a full review and complete relief from any federal district court.

The simple fact is that nothing has been decided with respect to the control or competition issues by the Commission or by the district court and, hence, no question is presented with respect to such issues.

However, a brief comment on some of the factual allegations in the Jurisdictional Statement may be helpful. Since appellants did not present any facts to the Commission with respect to the alleged control and competition problems, they feel free to conjure up a series of statements regarding the degree of control, relevant market, anti-competitive effect, etc. Those allegations are without foundation. For example, appellants assert that the relevant market consists of REA, with eighty-eight per cent of the market, Greyhound, with seven per cent, and "all other motor carriers of passenger combined" which "add most of the balance" (Jurisdictional Statement, p. 15). One is led to wonder why, if such facts are accurate, all of the major truck lines, freight forwarders and five major railroads are prosecuting this appeal. Surely, those carriers are not acting solely to protect the interests of the motor bus carriers. Moreover, as the hearings and attendant publicity with respect to the Post Office Department's proposal in H. R. 14904 to change the weight and size limits on parcel post make perfectly clear, the largest and most important competitor of REA is the United States Government.* Similarly, appellants distort the language of a document prepared by an officer of REA and an officer of Greyhound relating to possible arrangements between the two carriers which might prove economical.** That docu-

*REA stated before the Commission that it competes with Greyhound only for the business of shipping small packages of such size, weight, volume and character that they can be transported on passenger vehicles. Of this business, Greyhound handles substantially less than one per cent and REA handles two per cent of the United States total, the remaining ninety-seven per cent being handled by freight forwarders, trucks, railroads and the United States Post Office. (REA's Answer to Southern Pacific's Complaint, p. 2) Those statements were not controverted by appellants or any other parties.

**In their purported summarization of this memorandum (Jurisdictional Statement, p. 7, Note 8.), appellants twist its meaning by, for example, substituting the verb "would" where the memorandum simply says "could". Thus, the memorandum suggest that Greyhound

ment, which was presented to the Commission by REA, is nothing more than a listing of suggestions for consideration. Neither carrier is obligated in any way to follow the suggestions. As the district court found, the effect of that document "will depend on the outcome of the offer to purchase the one million shares and the subsequent actions of the REA Board." (Appendix A to Jurisdictional Statement, p. 37.)

The remaining two issues presented in the Jurisdictional Statement are purely makeweight. The order of the Commission was not in any respect ambiguous. The district court read it without difficulty. It is brief and to the point and any doubts as to its clarity or requisite specificity may be resolved by a quick reading.

Appellants have now largely abandoned their position below that they were entitled as a matter of constitutional due process to a hearing with respect to their positions before the Commission. Appellants' allegations there were entirely conclusory and neither controverted facts set forth by REA and Greyhound nor raised any new facts. To be sure, they drew different conclusions from the facts. However, a hearing is not necessary to consider varying conclusions. Moreover, the argument that a hearing was required flies in the face of Section 20a(6) which states that the Commission shall hold a hearing only "if it sees fit" and not otherwise. The Commission was required to, by Section

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"could absorb" service and maintenance work on REA equipment in certain locations (REA Return to Questionnaire, Annex 6, p. 2.); appellants' "summarization" states that Greyhound "would take over" such work (Note 8, ¶ 2). Also, the memorandum indicates that Greyhound's solicitation force "could be eliminated" and the service performed by REA (Annex G, p. 3); appellants "summarize" that statement by asserting that the two companies "would use" the same forces (Note 8, ¶ 4). Similarly, the memorandum suggests only what would happen "*if* REA would perform the terminal services, other than loading and unloading of buses . . ." (Annex G, p. 1, emphasis added); appellants' quotation of that statement carefully omits the "if" (Note 8, ¶ 4).

20a(2), and did conduct an elaborate investigation of the facts, but after that investigation the Commission concluded that a hearing was not necessary. Certainly, no hearing was required.

CONCLUSION

There being no substantial question requiring further argument, the judgment of the Court below should be affirmed.

August 29, 1966.

Respectfully submitted,

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APPENDIX A

Interstate Commerce Act, Section 20a, 41 Stat. 494, as amended, 49 U. S. C. § 20a:

". . . .

"(6) Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."